to the uninterrupted flow of a natural stream in its usual defined course is *jure naturae*. While it is clear, therefore, on the one hand, that this right would extend to all the minor channels which run into the main channels C and D in defined courses forming their feeders or tributaries, it is equally clear, on the other that it will extend no further. The declaration that the defendants Nos. 1 and 2 are not entitled at all to the rain water falling on the surface of their land between HH and G2, G3 before it enters or percolates into the channels C and D or their feeders and becomes thereby part of them cannot be supported. In the view, however, which we take of the case, it is necessary to direct the Subordinate Judge to return a finding on the fifth issue, and also to show on the plan annexed to the decree the name, if any, of the source, the course, and the lengths of each of the several tributaries or minor channels, which are visible and flow into the channels C and D across the land of defendants Nos. 1 and 2.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1887. April 19.

NÁGARAJA (PLAINTIFF), APPELLANT,

and

KÁSIMSA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Rent Recovery Act—Madras Act VIII of 1865, *ss.* 9, 10, 11.

A summary suit by a landlord to enforce the acceptance of a pattá under the Madras Rent Recovery Act should not be dismissed on a finding by the Appellate Court that the pattá tendered was not a proper pattá. The Appellate Court ought to pass the decree which the Court of First Instance should have passed.

SECOND appeal against the decree of J. A. Davies, Acting District Judge of Tanjore, in Appeal Suit No. 499 of 1884, reversing the decree of P. W. Moore, Acting Sub-Collector of Tanjore, in Summary Suit No. 51 of 1884.

This was a summary suit under s. 9 of the Madras Rent Recovery Act to enforce the acceptance of a pattá by the defendant from the plaintiff. The defence to the suit was that the

* Second Appeals Nos. 384 to 386 of 1886.

NÁGARAJA v. KÁSIMSA.

defendant was by custom liable to pay for his nanjai lands a fixed grain rent and not according to amáni, and that if he was to pay by varam, the landlord's share should be so fixed as not to exceed on an average the fixed grain rent paid hitherto.

The Sub-Collector passed a decree in favor of the plaintiff, but his decree was reversed and the suit dismissed on appeal by the District Judge on the ground that there was evidence of a customary payment of a fixed grain rent.

Rámá Ráu for appellant.

Mr. *Norton*, *Venkatrama Ayyar* and *Seshagiri Ayyar* for respondents.

The further facts of this case and the arguments adduced on appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT.—Two questions are argued in support of this second appeal. The first is that the Judge is in error in dismissing the suit on the ground that the pattá tendered was not a proper pattá, and we consider this objection to be well founded. It is provided by s. 10, cl. 3, Act VIII of 1865, that "if the Collector shall be of opinion that the pattá tendered is not a proper one, he shall decide what pattá ought to be offered and shall then pass a judgment ordering the defendant to accept such pattá and to execute a muchalká in accordance with it." As the appellate authority revising the decree of the Court of First Instance, the Judge ought to have passed the decree which the first Court should have passed upon the facts found by him. The decree must, therefore, be amended so as to bring it into conformity with the provision of law indicated above.

The next objection taken to the decree is that the rate of rent is not ascertained by the Judge in accordance with the rules contained in s. 11 of the Act. Although the Sub-Collector found that no contract was proved to pay a fixed grain rent, the Judge considered that there was evidence of customary payment of a fixed amount of grain per pangu. We entertain, no doubt, that the Judge intended to find that a contract to pay grain rent was evidenced by custom. It is then said that the evidence on record only shows that when the whole village was rented, the total rent in grain was fixed at 11 kalams per pangu for nanjai and that it is not sufficient for inferring a contract with each raiyat to accept rent at the average rate. It appears that in Summary Suit No. 15 of 1874, 65 per cent. of the nett outturn was

taken to represent the melvaram by the Assistant Collector, Mr. Forbes, and by the Judge on appeal. It is stated in the judgment then recorded that the defendant, Kasim Rowthen, agreed to be bound by the rate collected when the village was previously under amáni management for several years. Again, there was another summary suit in 1875 against a different tenant, and the decision as to the rate appears to have been the same as in 1874. In the lease granted to certain raiyats in September 1876 for ten years, there is a provision that the rate of 11 kalams per pangu is payable only during the time the lease is in force, and that on the expiration of the lease, the lands may be taken under amáni *as per custom observed* during the time of management by the late maharajah and during attachment by Government. Further, in 1882, similar suits were brought against some raiyats, and the amáni rate was adopted. It is no doubt true that the defendant was not a party to any of these suits, but they negative a general custom in the village to pay 11 kalams per pangu for nanjai and show that if that rate was ever paid by particular raiyats, it was paid under a special agreement on the understanding that on the expiration of the period fixed by the agreement, the amáni system was to be reverted to according to custom. It is not clear then on what specific custom the Judge relies, what was its duration, and whether it affords a reasonable ground for presuming that there was a contract with the defendant to accept rent at 11 kalams per pangu. We are not prepared to hold that if an average rate per pangu were accepted only in the event of the whole village being taken on lease, it would preclude the landlord from claiming more than the average rent when he has to make a separate settlement with each raiyat in respect of his holding. We shall therefore refer the following issues for trial:—

Whether it was the amáni or the ijárá system that was the customary system of management in the village prior to 1874, and what was the rate of melvaram paid under each system?

Whether the rate of 11 kalams per pangu was ever paid when the entire village was not rented out, and if so, for how many years? The finding will be returned in three months, when ten days will be allowed for filing objections. Each party will be at liberty to adduce fresh evidence.